IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 976 OF 2004

M/s.Jogani & Sachdev Developments. ... Appellants.
Versus.
Lawrence D'Souza & others. ... Respondents.

Shri T.E.Subramaniyam with Shri S.K.Shah for the Appellants.

Ms.R.C.Nichani for the Respondents.

Ms.Geeta Joglekar for the BMC.

CORAM : ABHAY S. OKA, J.

DATED : 25th April, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. The Appeal from Order is preferred by the original Defendant No.1 taking exception to the Judgment and Order dated 5th October 2004 passed by the learned Judge of the City Civil Court by which the Notice of Motion taken out by the original Plaintiff has been made absolute in terms of prayer clause (a).

2. The learned Counsel appearing for the Appellant has made submissions on merits of the appeal. It is brought to my notice that to the Notice of Motion for temporary injunction filed by the original Plaintiffs, a reply was filed by the Appellant. In paragraph 6 (a) the following contention has been raised by the Appellant in

the said reply Affidavit:

> ".....The value of each of such premises is around Rs.6,00,000/-. In any event, the same is over Rs.50,000/- and therefore, beyond the pecuniary jurisdiction of this Hon'ble Court. In fact the Plaintiffs have sought to obtain declarations in respect of fifteen premises, and assuming the same to be tenable, the Plaintiffs are liable to value the suit at the aggregate value of all the fifteen premises, which is in excess of Rs.90,00,000/-. I submit that the Plaintiffs are liable to value the reliefs sought for in the present application ad valorem, and in any view of the matter, the value thereof is in excess of Rs.50,000/- and therefore, beyond the jurisdiction of this Hon'ble Court. I submit that the present suit is liable to be returned to the Plaintiffs with a direction to them to present the same to the proper Court. I respectfully submit that this Hon'ble Court be pleased to try this issue as a preliminary issue of jurisdiction under Section 9A of the Code of Civil Procedure, 1908, and give its findings thereon."

I find from the impugned Judgment and order that the preliminary issue as regards the jurisdiction was not framed by the learned trial Judge as per the mandate of section 9A of the Code of Civil Procedure, 1908.

3. The learned Counsel appearing for the original Plaintiffs stated that there was a concession made by the learned Counsel appearing for the Appellant in the trial Court as regards the issue of jurisdiction and it was stated before the learned trial Judge that the Appellant was not pressing for framing the issue of jurisdiction.

4. A perusal of the impugned Judgment and Order shows that no such concession has been recorded therein. Paragraph 3 of the impugned Judgement and Order reads thus:

> "3. While considering this notice of motion, I feel there are certain legal considerations which are likely to go to very root of the matter, if the litigation continues. The nature of the contractual liability shows prima-facie that the parties to the contract are having their relationship as tenant and the owner and therefore, whether this dispute can be settled by this court is a point. Added to this, if the cost of each flat is

> taken into account, whether this court will have jurisdiction to decide the issue and lastly, since there are 15 plaintiffs and they are having their separate agreements, whether they can be filed the joint suit. I feel these points are very much in consideration, but not for presently since no party is interested in getting the issues framed at this level and that they are present pressing for the notice of motion to be decided first. In light of these conditions, I am also of the opinion that these points are very much emerging, but then these points can be settled
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> at the appropriate stage and not presently."

5. The mandate of section 9A of the said Code is crystal clear. The affidavit-in-reply filed by the Appellant shows that the issue of jurisdiction was clearly raised based on incorrect valuation made in the suit so far as the claim for Court fees and jurisdiction is concerned. Apart from the fact that the learned trial Judge has not recorded any such concession by the Counsel appearing for the Appellant, the learned Judge himself in paragraph 3 of the impugned Judgment and Order has stated that the issue of jurisdiction is very much involved. However, the learned trial Judge has noted that at present no party was interested in getting the issue framed and therefore, he has opined that the

said issue can be settled at appropriate stage. It is to be noted here that the learned Counsel appearing for the original Plaintiffs stated that she had appeared in the trial Court when the Notice of Motion was heard and in fact such concession was made by the learned Counsel appearing for the Appellant. Normally there is no reason to dispute the corectness of the solemn statement made by the learned Advocate.

6. However, it is not necessary to go into the said aspect as the learned trial Judge has himself noted that the issue of jurisdiction arose. After noting the issue of jurisdiction having been arisen from the pleadings, the same was not framed by the learned trial Judge thereby defeating the object of enacting section 9A of the said Code. The mandatory requirement of law in section 9A of the said Code cannot be by-passed and therefore the issue of jurisdiction will have to be framed and tried as a preliminary issue. Law requires that if an issue of jurisdiction is raised at the hearing of Application for temporary injunction, the same is required to be tried and decided at the threshold. Any concession by the Advocate/Counsel cannot be used to defeat the mandate of law. Therefore, the impugned Judgment and Order will have to be set aside and the Notice of Motion will have to be remanded to the trial Court. The learned trial Judge will have to frame an issue of jurisdiction and till the issue of

jurisdiction is decided and for a period of 15 days thereafter, the ad-interim relief which was operating till disposal of the Notice of Motion will continue to operate. It is made clear that I have not considered the merits of the case of the parties so far as the prayer for interim injunction in the Notice of Motion is concerned.

6. Hence the following order is passed:

(i) The impugned Judgment and Order dated 15th October 2004 is quashed and set aside. Notice of Motion No.2598 of 2004in Suit No.2974 of 2004 is restored to file.

(ii) The learned trial Judge will frame issue of jurisdiction as required by section 9A of the Code of Civil Procedure, 1908, on the basis of the contentions raised by the Appellant in paragraph 6(a) of the affidavit-in-reply filed before the trial Court. The learned trial Judge will give opportunity to both the parties to lead evidence on the preliminary issue of jurisdiction.

(iii) The preliminary issue of jurisdiction

shall be heard and decided by the learned trial Judge as expeditiously as possible and preferably on or before 12th August 2005. Till decision on the said preliminary issue, and for a period of 15 days thereafter, ad-interim order which was operating during the pendency of the Notice of Motion will continue to operate.

(iv) If the issue of jurisdiction is decided in favour of the Plaintiffs, the trial Court will immediately take up the Notice of Motion for hearing.

(v) All contentions of the parties on the issue of jurisdiction in the pending Notice of Motion are expressly kept open.

(vi) The appeal is partly allowed in the above terms with no order as to costs.

(vii) The parties and the trial Court to act on an authenticated copy of this order.

Judge.